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IN THE
COURT OF APPEALS OF INDIANA

RANDY SLYE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0803-CR-126
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven Rubick, Judge
Cause No. 49G04-0711-FC-231135

October 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Randy Slye appeals his conviction of Battery,[1] a class C felony, presenting the following restated issues for review:

1. Did the trial court err in denying Slye's motion for mistrial based upon alleged prosecutorial misconduct, and is Slye entitled to a new trial based upon other instances of prosecutorial misconduct?

2. Did the trial court err in failing to conduct an inquiry into the victim's competency to testify at trial?

We affirm.

The facts favorable to the judgment are that at about 9:30 p.m. on October 29, 2007, Rex Hensley and several other homeless men were drinking beers in or near a garage on LeGrange Street in Indianapolis when Slye, who also described himself as homeless, appeared and stated, "I'm gonna kill you'ans all[.]" *Transcript* at 21. Slye, whom Hensley did not know, was carrying a Jack Daniels bottle. Slye approached Hensley and struck him three times with the bottle. The first blow broke Hensley's jaw. The second blow struck Hensley in the forehead and shattered the bottle, cutting Hensley. The third blow struck Hensley on or near his left eye, resulting in a severe cut, swelling, and bruising. Hensley then tried to wrest the bottle from Slye, resulting in multiple cuts on Hensley's hands and fingers. While this was occurring, sixteen-year-old Jamie Smith approached the group and told Slye to stop hitting Hensley. Slye responded he "don't got no problems with [Smith]." *Id.* at 43.

Eventually, Hensley got up off the ground and walked to a nearby Speedway gas station, while Slye walked away in the opposite direction. Hensley called police from the

[1] Ind. Code Ann. § 35-42-2-1 (West, PREMISE through 2007 1st Regular Sess.).

Speedway station and Officer Steven Schafer of the Indianapolis Police Department responded. When he arrived, Officer Schafer found Hensley with "blood all over him." *Id.* at 61. He was told that the other person in the fight had headed south on Shelby Street, so Officer Schafer proceeded in that direction. As he drove south on Shelby, he saw someone waving at him from the parking lot of a White Castle restaurant. That someone turned out to be Smith, who had followed Slye to the restaurant and waited outside in the parking lot. Smith told Officer Schafer that the other man in the fight was in the restroom inside the White Castle. Officer Schafer went in and tried to open the restroom door, but it was locked. He knocked, and several seconds later, Slye opened the door. The officer observed that there was blood "all over the sink" and "bloody water dripping from [Slye's] hands." *Id*. at 64. Officer Shafer patted down Slye, obtained his identification, and asked him to step outside. Once outside, they waited for ten or fifteen minutes until someone at the Speedway station verified that Slye matched the description of the suspect.

Approximately three days later, Detective Jeff Doughty of the Indianapolis Police Department spoke with Hensley and photographed his injuries. The detective then showed Hensley a photo array containing Slye's photograph. He advised Hensley that the assailant's photo may or may not be included in the array. Hensley selected Slye's photo. The following day, Slye was charged with battery as a class C felony. He was found guilty as charged following a jury trial.

1.

Slye contends the trial court erred in denying his motion for mistrial based upon an alleged instance of prosecutorial misconduct. He also claims other instances of prosecutorial misconduct warrant reversal.

In order to reverse a conviction based upon a claim of prosecutorial misconduct, we must determine not only that misconduct occurred, but also that it had a probable persuasive effect on the jury's decision. *Rodriguez v. State*, 795 N.E.2d 1054 (Ind. Ct. App. 2003), *trans. denied*. When reviewing such a claim, we first determine whether the prosecutor engaged in misconduct and next consider whether, under all of the circumstances, the prosecutor's misconduct placed the defendant in a position of grave peril to which he or she should not have been subjected. *Id*. "This inquiry depends upon an analysis of the probable persuasive effect any misconduct had on the jury's decision, and whether the alleged misconduct was repeated such that it appears that the prosecutor engaged in a deliberate attempt to improperly prejudice the defendant." *Id*. at 1059. A mistrial is an extreme remedy, warranted only when less severe sanctions will not satisfactorily correct the error. *Rodriguez v. State*, 795 N.E.2d 1054. We review a decision on a motion for a mistrial for abuse of discretion. *Id.* To preserve a claim of prosecutorial misconduct, a defendant must not only object to the alleged misconduct, but must also request an admonishment and move for a mistrial if he believed the admonition did not remove any prejudicial effect. *Cowan v. State*, 783 N.E.12d 1270 (Ind. Ct. App. 2003), *trans. denied*.

Slye claims there were three separate instances of prosecutorial misconduct, all of which allegedly occurred during the State's cross-examination of Slye. The first occurred when Slye was recounting his version of the incident. According to Slye, he was walking by the garage in question when Hensley and Hensley's friends attacked him. Slye claimed Smith also joined in the attack. We reproduce the entire colloquy in order to provide context:

> Q [State]. … You weren't the guy that the young man on the bicycle saw standing over the top of him with the bottle in your hand -- that wasn't you?
>
> A [Slye]: If I'm not wrong I think one of the young men –
>
> Q. That wasn't you, sir – that's yes or no – that wasn't you?
>
> A. If I'm not wrong I think the young man on the bicycle was one of the young men that come running out of the garage.
>
> Q. That wasn't you, sir – so you – you have to answer the question when I ask it. I know you may want to answer someone else but when I say that wasn't you it's pretty simple – yes or no – was that you – was that you standing over the top of Mr. Hensley when that young man came in and said he saw the big guy standing over the top of the guy he was beating up – that wasn't you?
>
> A. I was defending myself.
>
> Q. That wasn't you sir?
>
> A. For all I know, is [sic] that young man was in part [sic] of the group.
>
> Q. Simple question – was that you or was that not you?
>
> A. I can't really answer your question because your question is not leading in the proper way.
>
> Q. So you don't like my question so you don't answer it?
>
> A. You put yourself in my position.

Q. Sir, I'm asking you a question – pretty simple – was that you that young man on the bicycle saw standing over the top of that man who was beaten up and cut?

A. Your question is drawing (unintelligible) and I already stated I was there defending myself.

Q. Was that you, sir, who was standing over the top of Mr. Hensley – pretty simple.

A. Your client attacked me.

Q. Are you gonna answer the question, sir?

A. I was there.

Q . So that was you the young man saw?

A. I was there – the one they were fighting.

Q. We can be here all night. You need to answer the question, sir. I'll ask the Judge to help you understand what you have to do here if you want. It's pretty simple – was that you the young man on the bicycle saw standing over Mr. Hensley – pretty simple, yes or no?

A. I was there when Mr. Hensley attacked me. I don't know what was happening. Mr. Hensley and five other people attacked me with wine bottles.

Q. Is there gonna be a time when you answer the question I just asked?

A I think I've answered your question, Sir.

Q. Was that you standing over the top of Mr. Hensley when that young man rode by on that bicycle and yelled at you to stop?

A. That young man was one of the young men standing there fighting me, sir.

Q. Oh, the young man was fighting you too?

A. He was with Mr. Hensley and them.

Q. He was with Mr. Hensley and them. You know what surprises me about that – that when he was on the stand your attorney didn't ask him any of those questions. Did you tell her that?

MS. BAUDER: Your Honor, I'm gonna object as to argumentative.

THE COURT: Sustained.

Q. Did you tell her that – that's not – that's a question, Judge – did you tell her that information?

A. Yes, sir.

MS. BAUDER: I would object he can't as it would be privileged what he and I discussed.

Transcript at 115-18. The court sustained the objection. Defense counsel then expressed the fear that the State's question created an implication that counsel had not done something, a proposition that the court doubted. Further, the court observed that attorney comments are not evidence. Defense counsel responded, "I understand that but I guess I feel – I don't know that it rises to the level of a mistrial but I feel the need at least at this point to make that motion." *Id*. at 119. The trial court denied the motion for mistrial.

Slye claims upon appeal that the State's question constituted prosecutorial misconduct because it "implied to the jury that Mr. Slye was lying to his attorney and to them." *Appellant's Brief* at 10. That implication, argues Slye, placed him in a position of grave peril to which he should not have been subjected. It does not strike us as improper, or even remarkable, that the State would ask questions of a defendant on the witness stand for the sole purpose of creating the implication that the defendant's claim of innocence is not

truthful. In fact, this is the very essence of the State's task in a criminal prosecution in which the defendant testifies to that effect. The State went far beyond "creating the implication" when it stated during closing argument, "He's lying. His testimony about his self defense is completely incredible." *Transcript* at 136.

We understand that woven into Slye's argument is the fact that the question arguably sought information that constituted privileged communications between Slye and his counsel. To the extent that it did, the trial court correctly sustained the objection. We fail to understand, however, how this particular question placed Slye in a position of grave peril to which he should not have been subjected, and Slye does not explain this to our satisfaction. There is no reversible error here.

Slye next complains that the State's reference to him as "a monster" constitutes prosecutorial misconduct warranting a new trial. It occurred while the State was cross-examining Slye, as follows:

> Q. So the little boy [Smith] came out of the garage too?
>
> A. The little boy was with the men.
>
> Q. He was inside that garage?
>
> A. I don't know where that little boy exactly came from. He was with them men.
>
> Q. He was with those men too attacking you? Was everyone on the street after you?
>
> A. Sir, you put four to five men come running up out of an abandoned garage – what's your client doing in an abandoned garage?

> Q. Sir, I can't imagine anybody attacking you. You look like a monster. I can't imagine anybody attacking you.

Id. at 120. At this point, Slye's counsel interposed an objection. Noting that the State's description of Slye was "perhaps a bit over the top", the court sustained the objection and struck the question. *Id*.

Slye does not explain how the question prejudiced him; he merely claims that it did. Viewed in context, we think it clear that the point of the State's question was to attack the credibility of Slye's claim that Hensley, Smith, and the others attacked him. Slye is a much bigger man than the others involved that night, including Hensley, and the State's comment appears to have been calculated to emphasize that to the jury. In fact, this was made clear in the State's first question after the objection was sustained, i.e., "Four or five men decide to confront a man your size, is that what you're trying to get these people to believe – is that really – a 16 year old boy on a bicycle – [.]" *Id*. at 121. As was true of Slye's first complaint above, the purpose of the State's comment was to attack the credibility of Slye's claim of self-defense. Although the comment in question was couched in unfortunate terms, the point of the comment was proper and the trial court's striking of the question gave the State a chance to immediately clarify the legitimate point of the comment, and to do so in less incendiary terms. Slye was not subjected to grave peril as a result of the comment.

Finally on this issue, Slye contends the State committed prosecutorial misconduct in arguing with Slye on the witness stand. We have already reproduced above some of the excerpts from Slye's cross-examination upon which this claim is based. Like that discussion (involving whether Slye was the person that Smith saw beating Hensley), the other one to

which Slye directs our attention involved Slye repeatedly failing to answer a question posed by the State. After reviewing the relevant portions of the transcript, it strikes us that Slye was the one who was arguing, or at least provoking the State's comments, because he repeatedly evaded the questions posed to him.

In summary, the trial court did not err in denying Slye's motion for mistrial. Neither in that instance nor in any other of the instances of which Slye complains did the State commit misconduct. In addition, Slye is not entitled to reversal because he has not shown that the complained of acts had a probable persuasive effect on the jury. *See Overstreet v. State*, 783 N.E.2d 1140 (Ind. 2003) (a claim of prosecutorial misconduct requires a determination that there was misconduct by the prosecutor and that it had a probable persuasive effect on the jury's decision), *cert. denied*, 540 U.S. 1150 (2004).

2.

Slye contends the trial court erred in determining that the victim was competent to testify at trial.

When a witness's competency to testify is placed in issue, the trial court has a duty to schedule a hearing to make that determination. *Hughes v. State*, 546 N.E.2d 1203 (Ind. 1989). The test of competency "is whether the witness has sufficient mental capacity to perceive, to remember, to narrate the incident he has observed, and to understand and appreciate the nature and obligation of an oath." *Id*. at 1209. The determination of a witness's competency is committed to the trial court's sound discretion and is reversible only

when a manifest abuse of discretion has occurred. *Yanoff v. Muncy*, 688 N.E.2d 1259 (Ind. 1997).[2]

After the jury had been empanelled but before the presentation of evidence, the following colloquy ensued:

> MS. BAUDER [defense counsel]: Your Honor, on the break this afternoon I believe – or in the afternoon I had the occasion – Mr. Rigney was nice enough to let me talk to all of his witnesses out in the hallway and one of the witnesses that I did speak to was Mr. Hensley, the alleged victim in this case. In speaking with Mr. Hensley it would be of [sic] my opinion that he might have consumed some alcohol. That caused me a little bit of concern. I certainly could be wrong. I tend to think I have a pretty good nose about this given my current occupation but I would like to err on the side of caution. I wanted to address that with the Court. It just causes me concern about I want [sic] Mr. Slye to have a fair trial and I'm not sure how to proceed other than to ask the Court if it would at all be permissible to ask Mr. Hensley to submit to a PBT.
>
> THE COURT: Mr. Rigney --
>
> MR. CUMMINGS [the State]: May I respond, Judge?
>
> THE COURT: You may.
>
> MR. CUMMINGS: I have had several conversations with Mr. Hensley and it is not my impression that he is under the influence of an alcoholic substance. I do believe Mr. Hensley drinks regularly. He probably carries a level – a blood alcohol content in his system. There's nothing that led me to believe from the conversations that I had with him that he is under the influence but he's the kind of a person who drinks so much that I think he probably is gonna have a certain – he's gonna respond to a PBT even if he hadn't had anything to drink for some time. It might be appropriate if the Court is concerned to make your own inquiry and examine or ask questions but I suspect that he's the kind of person who's gonna test even if he hasn't had something to drink over a substantial period of time, Judge.

[2] The State presents a compelling argument that Slye waived this issue by failing to object to the admission of Hensley's testimony, citing *Mitchell v. State*, 726 N.E.2d 1228 (Ind. 2000). We prefer, however, to resolve issues on the merits, and choose to do so here.

> THE COURT: Well it would seem to me that if the State's complaining witness is under the influence it's more of a problem for Mr. Rigney than it would be for Mr. Slye. I haven't met the fellow. I don't plan to spend any time chatting with him and I have two attorneys who are well versed in dealing with intoxicated individuals. He may be under the influence. He may simply smell bad but I am not inclined to suspend the trial or terminate these proceedings based on the suspicion that the State's witness is drunk. You at least made a record. If he turns out to be a very bad witness, then I suppose we understand why.
>
> MS. BAUDER: Thank you, Your Honor.

Transcript at 13-15.

We first observe that defense counsel's comments did not present a sufficiently clear challenge to Hensley's competence such as to trigger a duty on the part of the trial court to inquire further into that matter in the first place. Counsel merely expressed her opinion that he "might" have consumed "some alcohol" and that she was therefore "a little bit [] concern[ed]." *Id*. at 13. She acknowledged, however, that she "certainly could be wrong" in that regard. *Id*. The trial court thoughtfully explained why it would permit Hensley to testify notwithstanding defense counsel's stated concerns. Further, we agree with the trial court that such (i.e., permitting Hensley to testify in light of defense counsel's comments) was done at the State's peril. As the trial court observed, if Hensley was intoxicated to any discernible degree while on the witness stand, it would have been to the detriment of the State's case-in-chief, not Slye's defense.

As a final matter, having read the transcript of Hensley's trial testimony, we find no indication that Hensley was indeed impaired, at least noticeably so. In fact, Slye does not suggest otherwise on appeal. Hensley's responses were appropriate and lucid, and apparently

consistent with his pretrial statements. The bottom line is that we perceive no harm to Slye's defense caused by the trial court's actions. Even assuming defense counsel presented a request to inquire into Hensley's competence, Hensley's trial performance suggests he would have been found competent. The trial court did not abuse its discretion in declining to inquire further into Hensley's competence.

Judgment affirmed.

DARDEN, J., and BARNES, J., concur